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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 16

WILLIAM L. AUSTIN ..... *Petitioner*

vs.

COMMONWEALTH OF KENTUCKY ..... *Respondent*

BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENT

The Kentucky statute which was amended in 1962 to expressly require proof of scienter and to create a rebuttable presumption of knowledge from the fact of sale, follows the presumption recommended by the American Law Institute Model Penal Code in Section 251.4(2). There is a rational connection between the fact of sale of obscene matter and the presumed fact of knowledge of its character. The prima facie presumption in the Kentucky statute does not remove the burden of proof from the Commonwealth but merely shifts the burden of going forward with the evidence to the defendant after the state has proved enough to make it just for the defendant to be required to repel what has been

proved with excuse or explanation. The Kentucky statute is not subject to the defect noted in *Smith v. California,* 361 U.S. 147 since the element of scienter is expressly required and the defendant is permitted to produce evidence to show that he lacked knowledge of the contents or the obscene character of the publication.

The trial judge instructed that the jury must find from the evidence beyond a reasonable doubt that petitioner had knowledge of the contents and the character of the magazines. The manner in which KRS 436.100 was applied in this case does not permit a conclusion that the effect of the evidentiary presumption was to authorize a conviction without sufficient proof of scienter. The requirement of scienter does not necessitate proof that a defendant knew subjectively that the material was obscene. It is only required that it be shown that the defendant had knowledge of the contents of the publication. There was sufficient proof of scienter in this case and it was not submitted to the jury solely on the basis of a statutory presumption of knowledge.

Rosen v. United States, 161 U.S. 29 holds that the subjective knowledge of the defendant of the obscene character of the publication which he sells is completely irrelevant. The Court in recent decisions has avoided passing on whether "honest mistake" as to whether the contents of a publication in fact constituted obscenity need be an excuse. The instruction requested by petitioner that he should be acquitted if the jury found that he had a good faith belief that the two magazines in question were not obscene should not have been given by the trial court since this was not the defense presented by petitioner. Petitioner defended solely on the ground that he had no knowledge whatever that the two magazines for which he was being prosecuted were offered for sale in his store, and did not know their contents. The evidence shows that petitioner knew that the group of girlie magazines

which he had segregated and classified as adult reading were of questionable character, and if he did not know of the existence or contents of the two titles in question, he should have known and is not excused by failure to make reasonable investigation. The facts in this case do not call for a re-evaluation of the *Rosen* statement of law since the evidence presented at petitioner's trial and the nature of his defense do not permit him to claim "honest mistake."

The trial court properly excluded evidence offered by petitioner consisting of copies of paperback books, a nudist magazine, and material taken from the Paducah public library, since such material was irrelevant to the prosecution and was not comparable to the two magazines in issue. Even as to material which might be considered similar in content and style, the fact that such material has been sold previously without governmental interefernce does not mean that such comparable material is not itself obscene. The fact that other publications equally bad have been sold without prosecution does not excuse the petitioner in selling the obscene material in question. Petitioner could not justify his lack of knowledge of the contents of the magazines in question by testifying that since he relied on the second class mailing permit issued by the United States post office there was no need for him to personally examine any material which he was selling.

ARGUMENT

I. SECTION 436.100 OF THE KENTUCKY REVISED STATUTES DOES NOT, ON ITS FACE AND AS CONSTRUED AND APPLIED, ABRIDGE FREEDOMS OF SPEECH AND PRESS AND DEPRIVE PERSONS OF LIBERTY WITHOUT DUE PROCESS OF LAW BY VIRTUE OF PROVIDING THAT THE SALE OF ANY PUBLICATION FOUND

TO BE OBSCENE SHALL BE PRIMA FACIE EVIDENCE THAT THE SELLER HAD KNOWLEDGE OF ITS OBSCENE CHARACTER

The Kentucky statute prohibiting sale of obscene literature under which petitioner was convicted, KRS 436.100, enacted in 1894, contained no express requirement of scienter from that date until 1962 at which time it was amended by the insertion of a provision in the definition of the offense that the sale of the obscene matter must be "with knowledge of the contents or character." Subsection (4) was also added which provides that the sale of any publication found to be obscene "shall be prima facie evidence" that the seller "had knowledge of the obscene character" of the material. Kentucky Acts 1962, Chapter 273.

The 1962 amendment to the Kentucky statute which had the effect of expressly requiring proof of scienter and creating a rebuttable presumption of knowledge from the fact of sale follows the American Law Institute Model Penal Code, 1962 Proposed official Draft, Section 251.4(2), which requires proof that a defendant "knowingly or recklessly" sold the obscene literature and establishes a presumption of guilty knowledge:

> "A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly."

Tentative Draft No. 6 of the American Law Institute Model Penal Code (May 6, 1957) offered in Section 207.10(7) two alternates to the prevailing statutory law on "scienter." The first would have created a rebuttable presumption of knowledge from the defendant's act of dissemination of the obscene material and placed the burden on defendant to overcome this presumption by "a preponderance of the evidence" to the contrary. The second alternative proposal in the 1957

draft suggested the same rebuttable presumption of knowledge but left with the prosecution the burden of proving "scienter" beyond a reasonable doubt. The 1962 Model Penal Code, Section 251.4(2), abandoned the first proposal and settled on the latter. The Comments on the 1957 Draft of the Model Penal Code, page 50, stated the advisability of a presumption of knowledge due to the logical connection existing between the fact of sale of material of predominantly prurient interest appeal and knowledge of its contents and quality:

> " . . . Since 'predominant appeal to prurient interest' is a material element of obscenity, the prosecution would have the burden of proving knowledge or recklessness as to this quality of the material, if no special provision is inserted here. We believe it appropriate to have special provisions, because of *the high probability that persons disseminating obscenity do know the contents and quality of what they dis seminate* and because of the exceptional difficulty of disproving beyond a reasonable doubt a defendant's assertion that the prurient appeal of the accused material was not apparent to him.
>
> "Accordingly we propose, in subsection (7), to establish a presumption that one who disseminates obscenity is aware of what is in the book or magazine that he distributes. . . ."

Section 251.4(2) of the Model Penal Code was cited with approval by Mr. Justice Brennan in *Mishkin v. New York*, 383 U.S. 502 (1966), footnote 9. Since the Court in that case aproved the scienter provision of the Model Penal Code, it necessarily also gave support to the special presumption therein inasmuch as such presumption is an integral part of the Model Penal Code scienter scheme.

In *Speiser v. Randall*, 357 U.S. 513 (1958) is was held that a statute affecting freedom of speech is violative of due process where it places upon a taxpayer the initial burden of

bringing forth proof and the continuing burden throughout the proceedings of establishing that he was not guilty of engaging in advocating the overthrow of the government by force. The opinion of the Court states that it is not within the province of a legislature to declare an individual presumptively guilty of a crime, and the legislature cannot provide that the finding of an indictment or mere proof of the identity of the accused shall create a presumption of the existence of all the facts essential to guilt. 357 U.S. 523, 524. However, the Court noted that the "burden of going forward with the evidence" at some stages of a criminal trial may be placed on the defendant after the state has proved enough to require the defendant to excuse his conduct or explain it:

> ". . . Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has 'proved enough to make it just for the defendant to be required to repel wha has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.' . . ."

The Comments on Section 207.10 of the 1957 draft of the Model Penal Code indicate that the effect of a presumption such as the one contained in KRS 436.100(4) is to make the case sufficient to convict unless the evidence negatives the presumed fact of knowledge of the character of the publication, but the burden of proof beyond a reasonable doubt still remains on the prosecution and does not shift to the defendant. See pages 16, 50, 52, 53 of Tentative Draft No. 6. KRS 436.100(4) did not operate to shift the burden of proof to the petitioner so that he was presumptively guilty of the offense, but merely shifted the "burden of going forward with the evidence" to him once the state had proved that he

made a sale of obscene literature in the regular course of his business, which raised a rational presumption and made a prima facie case that defendant had knowledge of the contents of the publication and the character of the material sold. Even in the absence of a statutory presumption of knowledge from the fact of sale, courts have seen the wisdom of establishing a prima facie case from proof of sale of obsence matter and requiring defendants to go forward with evidence showing lack of guilty knowledge or explaining their lack of knowledge. *State v. Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225, 231 (1963); *State v. Oman*, 261 Minn. 10, 110 N.W. 2d 514, 523 (1961); *State v. Miller*, 45 W.Va. 59, 112 S.E. 2d 472, 478 (1960). *State v. Andrews*, 150 Conn. 92, 186 A. (2) 546, 552 (1962).

The Court decided in *Smith v. California*, 361 U.S. 147 that a statute punishing the mere possession by a defendant in his bookstore of any book determined to be obscene is violative of freedom of the press guaranteed by the First Amendment where it makes the bookseller criminally liable without knowledge, and thereby imposes absolute criminal liability for having obscene books in possession. The Kentucky statute under which petitioner was convicted is not subject to the defect condemned in the *Smith* case since (1) the vital element of scienter was expressly incorporated in the statute and there could be no conviction unless it was found that the sale of obscene literature was "with knowledge of the contents or character", (2) the Commonwealth was required to meet the burden of proof by producing evidence of a sale of an obscene publication under circumstances sufficient to warrant an inference of knowledge of the contents of the publication or its objectionable character, and (3) the evidentiary presumption of knowledge of the obscene character was rebuttable and defendant was permitted to introduce evidence to show that he lacked scienter in that he did not know, and could not reasonably have known, of the existence of material

of such character in his store, or that he knew of it but honestly believed, and had reasonable grounds to believe, that it was not obscene.

The trial court, in instructing the jurors, expressly required that they believe from the evidence beyond a reasonable doubt that the defendant "knowingly" had for sale at his Readmore News Stand the two magazines in question, and that "the defendant had knowledge of the contents and the character of said magazines." (R. 109). The jury, of course, was not instructed regarding any prima facie case or presumption favoring the Commonwealth. KRS 436.100 as construed by the trial court plainly required the evidence to show beyond a reasonable doubt that the sale was with knowledge of the contents *and* the character of the publications found to be obscene.

The manner in which KRS 436.100 was applied in this case does not permit a conclusion that the effect of the evidentiary presumption was to authorize a conviction without proof of scienter. It is apparent that the prima facie presumption provision of the Kentucky statute was not applied in this case so as to result in a conviction of a defendant who had established a defense of lack of knowledge of the contents or an honest belief that the publications were not obscene.

In order for the prosecution to meet the burden of proof on the issue of scienter, it is by no means necessary that there be evidence showing that a defendant knew subjectively that the material was obscene. *Rosen v. United States*, 161 U.S. 29 (1896) held that knowledge of the contents of the publication is sufficient and subjective knowledge of obscenity is irrelevant. This should be so, because a person can be charged with knowledge of the community standards and what a jury may decide to be obscene at any given time. The *Rosen* case was cited for this proposition in *Roth v. United States*, 354 U. S. 476 at 491, footnote 28. The majority opinion in *Mishkin*

made it quite clear that proof of subjective knowledge is not a constitutional requirement. *Mishkin v. New York*, 383 U.S. 502 (1966). All that is required to constitute sufficient proof of scienter is evidence of the circumstances of the sale justifying an inference that defendant had knowledge of the contents of the publication. Mr. Justice Brennan in *Smith v. California*, 361 U.S. 147 at 154 stated:

> ". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his *awareness of its contents*. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

In this case it is clear that there was sufficient proof of scienter consisting of the following evidence:

1. Petitioner was a wholesale distributor of publications in this area and in such capacity procured and distributed the magazines in question to the retail bookstore owned and operated by him. (R. 39 Q. 14).

2. In 1960, some three years prior to the sale in question, the city commissioners of the city of Paducah, Kentucky made complaint to petitioner in his capacity as wholesale distributor of reading material regarding the objectionable features of the particular class of magazines known as girlie magazines. (R. 40 Q. 19; 44). Petitioner ceased supplying the girlie magazines to a certain retail store located near a school.

3. In May, 1963, some four months before the sale in question, petitioner met with several local ministers representing the Paducah Area Ministerial Fellowship to discuss complaints which the ministers had been receiving from the public regarding the class of magazines known as girlie magazines, which were being handled by petitioner as a wholesale distributor and in his retail store. (R. 23 Q. 15; 40 Q. 22). The concern expressed by the ministers at this meeting was not limited to complaints from parents of minor children but extended to obscenity in general (R. 24 Q. 2).

4. Following the meeting with the ministers, petitioner personally caused 25 to 30 girlie magazines in his retail bookstore to be collected and segregated from the rest of his material by placing them on a separate rack behind the cashier's counter so that sales of such magazines would be limited to adults only (R. 41 Q. 26). The magazines were stapled to prevent persons from leafing through them and looking at the pictures. (R. 34 Q. 60).

5. The covers of the girlie magazines showing pictures of nude or semi-nude females together with the titles of the various issues proclaim the nature of the publications and give notice of the character of the material. Petitioner's Exhibits No. 2 and No. 3 are photographs of the rack of girlie magazines in his retail store and no one glancing at this prominent display could help being unaware of the nature of the publications and their intended prurient appeal. (R. 35).

It has been held by the highest state courts of several jurisdictions that in regard to obscene girlie magazines or nudist magazines proof of scienter may be found in the covers bearing photographs of nude or semi-nude women so that even the most casual observation or cursory examination could not fail to acquaint the seller with the nature of the contents and character of the material. See *State v. Chobot*, 12 Wis. 2d 110, 106 N.W. 2d 286 at 291, 292 (1960) involving four girlie magazines, including "Spree". Appeal dismissed for want of a substantial federal question. *Chobot v. Wisconsin*, 368 U.S. 15. *State v. Hudson County News Co.*, 41 N.J. 247, 196 A. 2d 225 at 230 (1963) involving five girlie magazines, including "Spree". *State v. Andrews*, 150 Conn. 92, 186 A. 2d 546 at 552 (1962) involving two girlie magazines. *Chicago v. Doe*, 47 Ill. App. 2d 460, 197 N.E. 2d 711 at 715 (1964) involving a girlie magazine. *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 at 862 (1964), three nudist magazines. *Missouri v. Vollmar*, 389 S.W. 2d

20 at 29 (1965), eight nudist magazines. Significant evidence of scienter consisting of "the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations" was noted by Mr. Justice Brennan in *Mishkin v. New York*, 383 U.S. 502.

It thus appears that there was sufficient evidence of scienter presented here to warrant petitioner's conviction. *Mishkin v. New York*, 383 U.S. 502 (1966). The case was not submitted to the jury on the basis of a statutory presumption of knowledge and it was obviously not necessary to do so.

II. THE KENTUCKY STATUTE, ON ITS FACE AND AS CONSTRUED AND APPLIED, DOES NOT ABRIDGE FREEDOMS OF SPEECH AND PRESS AND DEPRIVE PERSONS OF LIBERTY WITHOUT DUE PROCESS BECAUSE THE TRIAL COURT REFUSED TO INSTRUCT THE JURY THAT PETITIONER WAS ENTITLED TO AN ACQUITTAL IF THE JURY FOUND THAT HE HAD A GOOD FAITH BELIEF THAT THE PUBLICATIONS IN QUESTION WERE NOT OBSCENE

The Court in both *Smith v. California*, 361 U.S. 147, 154 and *Mishkin v. New York*, 383 U.S. 502 avoided passing on whether "honest mistake" as to whether the contents of a publication in fact constituted obscenity need be an excuse as a matter of constitutional principle. *Rosen v. United States*, 161 U.S. 29 held that if the one disseminating the material knew or had notice of its contents, the offense is complete although the defendant himself did not regard the publication as one that the statute forbade. See the approval given to this statement in *Roth v. United States*, 354 U.S. 476 at 491, footnote 28.

It cannot be said that KRS 436.100 on its face prohibits a good faith belief defense. The prima facie case created by subsection (4) of knowledge of the obscene character of the material is clearly rebuttable by the terms of the statute.

The trial court in this case instructed the jury that it must believe from the evidence beyond a reasonable doubt that petitioner "knowingly" had the magazines at his retail bookstore with the intent and purpose that they be sold, and that the defendant "had knowledge of the contents and character of said magazines." (R. 109). Petitioner requested the Court to give a total of 51 separate instructions, among which was instruction No. 19 (R. 100) which would have provided:

> "If you find that the defendant had a good faith belief that the magazines in question were not obscene, you must acquit the defendant even if you personally believe that the magazines are obscene."

The facts in this case do not call for a re-evaluation of the *Rosen* statement of law since the evidence presented at petitioner's trial and the nature of his defense do not permit him to claim "honest mistake."

An honest mistake concerning the obscenity of the material necessarily implies that the mistake must be a reasonable one. An unreasonable belief that the law protects certain material is equivalent to a distributor deliberately remaining uninformed as to the facts of the material. In order for a defendant to present a defense of good faith belief that a certain publication was not obscene, he must not only testify that he honestly did not regard it as obscene but must also show that he had reasonable grounds for such belief. The commentary on Section 207.10 of the American Law Institute Model Penal Code, Tentative Draft No. 6, page 51, indicates that the drafters believed that the type of case in which this defense might properly be presented would be "those cases admitting of a respectable argument that the appeal of the

material is predominantly artistic or scientific." In the present case the nature of the publications in question shows that petitioner could have had no reasonable grounds for believing that they were not obscene, and the evidence indicates he recognized that this class of material had definite appeal to the prurient interest of the public so that sales should be limited to adults only.

This Court has declined to review three cases in which girlie magazines were held to be obscene as a matter of law by state supreme courts under the test set out in the *Roth-Alberts* case, 354 U.S. 476. In *State v. Chobot,* 12 Wis. 2d 110, 106 N.W. 2d 286 (1961) it was held that girlie magazines were obscene which contained numerous photographs of nudes and semi-nudes in provocative poses, many of them on beds and davenports, with the pictures providing an appropriate setting for accompanying sex stories. One of these magazines was "Spree." The appeal to this Court was dismissed for want of a substantial federal question in *Chobot v. Wisconsin,* 368 U.S. 15. In *Monfred v. State,* 226 Md. 312, 173 A. 2d 173 (1961), although the state court was of the opinion that "mere nudity in and of itself" is not obscene, it found five girlie magazines to be obscene as a matter of law where they presented numerous pictures of nude or semi-nude women showing "come hither" expressions and poses interspersed with pointedly suggestive sex stories. This Court denied certiorari in *Monfred v. Maryland,* 368 U.S. 953. See also *Goldstein v. Virginia,* certiorari denied, 372 U.S. 910 (1963). For other decisions of state appellate courts holding girlie magazines to be obscene, see *State v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962); *State v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225 (1963); *Cincinnati v. King,* (Ohio) 152 N.E. 2d 23 (1958).

It thus appears that at the time these issues of "Spree" and "High Heels" were purchased from petitioner's bookstore in September, 1963, there was good reason for petitioner to

believe that there was a serious question as to the obscene content of the rack of 25 to 30 girlie magazines which he had ordered segregated and displayed for sale in his store. Petitioner should have exercised special care in examining this particular small group of magazines and selected for sale to the general public only those issues with which he was familiar and which he believed with reason could not be said to be patently offensive measured by current community standards. Petitioner testified (R. 38, 41):

"76. Do you yourself know or did anybody ever advise you that these two magazines were on the stand?

"A. They did not.

"29. How long have you sold the publication known as Spree?

"A. I do not know.

"30. How long have you sold the publication known as High Heels?

"A. Frankly, I didn't even know there was a High Heels. I had heard of Spree, but I never knew of High Heels."

It appears that petitioner's defense with respect to "High Heels" was that he did not even know of the existence of a magazine by that name. His defense as to the notorious "Spree" was that, while he had heard of it, he had no idea that it was included in the 25 to 30 girlie magazine titles which he had selected and ordered displayed behind the cashier's stand in his store. Such defense is not that of "good faith belief that the magazines were not obscene." In this type of case there is certainly no cause for the trial court to instruct on a good faith defense, even if it should be held that as a matter of constitutional principle such defense must be allowed.

III. THE KENTUCKY STATUTE IS NOT UNCONSTITUTIONAL AS CONSTRUED AND

APPLIED BECAUSE THE TRIAL COURT EXCLUDED FROM CONSIDERATION BY THE JURY ORAL AND DOCUMENTARY EVIDENCE SHOWING THAT PETITIONER HAD NO KNOWLEDGE OF THE CONTENTS OR OF THE OBSCENITY OF THE PUBLICATIONS IN QUESTION

Petitioner's chief defense in this prosecution was that the two magazines "Spree" and "High Heels" were not obscene. As noted under the preceding argument, so far as the issue of knowledge of the contents or of the obscenity of the publications was concerned, petitioner's defense was that he did not know there was such a publication as "High Heels" and, although he had heard of "Spree", he did not know any issues of such magazines were in his retail bookstore.

Petitioner offered to introduce copies of pictures taken from books in the Paducah public library which portrayed the nude human body. The books from which these pictures were copied were "Masters of Modern Art", "Greek Sculpture" and "Pictures That Talk, U. S. Camera, 1959." (R. 64, 65). The purpose of these pictures was to prove that photographs of nudes were contained in many publications accepted in the community, and therefore nude photographs in the two girlie magazines could not make those publications obscene. The trial court rejected these items, and properly so, since they were not in any sense comparable to the publications on trial or relevant to the prosecution. The fact that nudity may be accepted in recognized works of art does not mean that photographs of nudes in the style and format of girlie magazines are acceptable under contemporary community standards. Petitioner could not reasonably have believed that the portrayal of the nude form in Greek sculpture or in pictures in the museum of modern art or in serious photographic issues meant that the girlie magazines could not be obscene. He did not testify that this was his belief.

Petitioner also sought to introduce in evidence six paperback books including "Tropic of Capricorn", and other so-called literary works containing questionable passages of prurient appeal. It was not shown that petitioner had read these books. The books were rejected as not being relevant to the prosecution. (R. 60, 61). The paperback books, being literary works, were not comparable to the magazines in issue and had no bearing whatever on the case. It has not been established that such books cannot legally be the subject of obscenity prosecutions.

A certain issue of Sunshine and Health nudist magazine was offered in evidence which had been involved in a suit to enjoin the U. S. Post office department from confiscating issues of the magazines, in which this Court granted the injunction. (R. 62). The trial court refused to permit this in evidence. It was not shown that petitioner was acquainted with this magazine. Only the two girlie magazines were on trial and a nudist magazine is not of the same class as "Spree" and "High Heels." See Commentaries on the Law of Obscenity, Vol. 1, No. 2, (November, 1965) published by Citizens for Decent Literature, Inc., pages 1-21 to 1-30, for a discussion of evidence of the preparation of girlie and nudist magazines and the distinction between the two classes of publications. It is obvious that nudist magazines may, and have been held to be, just as objectionable or more so, and are not immune from obscenity charges.

Other publications appearing in commerce are not relevant in an obscenity trial of a defendant for selling a particular magazine for the reason that there is no proof that such offered items are themselves non-obscene, and the fact of sale of other possibly objectionable publications without prosecution would not palliate the sale by the defendant. *State v. Ulsemer*, 24 Wash. 657, 64 P. 800; *New York v. Finkelstein*, 11 N.Y. (2) 300, 183 N.E. (2) 661, cert. denied, 371 U.S. 863; *Womack v. United States*, 111 U.S. App. D.C. 8, 294, F. 2d 204,

206, cert. denied, 365 U.S. 859; *United States v. West Coast News Co.*, 228 F. Supp. 171, affirmed in 357 F. 2d 855. At the very least, other publications offered as exhibits should be similar in content and style to the questionable material upon which the prosecution is based.

The trial court sustained an objection to a question asked petitioner of "whether it would be possible for your concern to economically run an outfit like Readmore and personally censor each of those ten or eleven thousand titles?" The answer by avowal was that "it would be almost humanly impossible to read everything we handle." (R. 30, 31). However, petitioner had segregated 25 to 30 different girlie magazines and placed them on a separate rack behind the cashier's stand in his retail store. It was not necessary for him to read everything that he handled. It was only necessary that he take the trouble to scan the small group of magazines which he himself had classified as having prurient interest appeal and the sales of which he had limited to adults only. A dealer in publications cannot be permitted to offer as a defense the fact that his business was so big and involved so many different publications that he could not possibly be aware of what he was handling.

Petitioner stated that instead of trying to keep abreast of the nature of the material handled in his business, he relied on whether the publications had a second class mailing permit from the U. S. post office. He was permitted to testify (R. 30):

> ". . . . We use the second class permit quite a bit. We feel like a magazine that don't have a second class permit *maybe* should be withheld from general distribution, *but frankly, I can't see any difference* in the ones that have and don't have. . . . We have tried to use it as a barometer. *We have not completely done so* but we stay very close to that. At least we ask our publishers to recognize that." (Emphasis added)

Objections were sustained to questions asking petitioner to testify as to the meaning from the standpoint of obscenity of

a second class mailing permit from the United States post office (R. 31 Q. 44; 33 Q. 52), and whether other named magazines not involved in the prosecution had such second class permits. (R. 32 Q. 45). However, petitioner was allowed to answer a question as to whether all the girlie magazines shown in his Exhibits No. 2 and No. 3 had second class permits. (R. 35 Q. 68). There was no attempt to show whether "Spree" and "High Heels" had second class permits.

The granting of a second class mailing permit by the Federal postal authorities is not proof that the material is not obscene in a state prosecution, and furnishes no reason for petitioner to abdicate his responsibilities as to examination of a class of material known by him to have prurient appeal and concerning which he had received complaints. If petitioner did in fact rely on the second class mailing permit rather than looking at the girlie magazines himself, his action in doing so was not reasonable under the circumstances. A defendant cannot justify lack of knowledge of the contents or obscenity of certain magazines by the flimsy device of alleged reliance upon a second class mailing permit from the U. S. post office. The trial court properly excluded evidence to the effect that administrative determinations of the post office department concerning whether magazines should have second class mailing privileges are so indicative of the obscene or non-obscene character of the material as to enable a dealer to rely on them and dispense with the necessity of acquainting himself with the contents.

Objections were sustained to questions asking petitioner whether all of the girlie magazines shown on display in his store in his Exhibits No. 2 and No. 3 had been sold in the entire area without being banned or restricted by any governmental authority or community group. (R. 36 Q. 72; 37 Q. 73). But he was permitted to testify that he had been selling this same type of magazine for years and there had never been an objection "that we didn't observe and correct." (R. 36 Q.

69, 70). Assuming that the other girlie magazines in petitioner's Exhibits No. 2 and No. 3 were in fact similar in content, style and degree to "Spree" and "High Heels", there is no showing that none of them could be suspected of being obscene, and petitioner's own testimony contradicted any implication that there had never been any complaints and that sales of this type of magazine were apparently quite acceptable to the community.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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